United States Department of Labor
Employees' Compensation Appeals Board

G.R., Appellant	)	
and	)	**Docket No. 10-861**
	)	**Issued: December 8, 2010**
U.S. POSTAL SERVICE, POST OFFICE, Bronx, NY, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On February 17, 2010 appellant filed a timely appeal of the Office of Workers' Compensation Programs nonmerit decision dated November 18, 2009 denying her request for reconsideration on the grounds that it was not timely filed and failed to establish clear evidence of error. Because more than one year elapsed from the last merit decision dated February 1, 2005 to the filing of this appeal, the Board lacks jurisdiction to review the merits of appellant's claim pursuant to 20 C.F.R. §§ 501.2(c) and 501.3.[1]

ISSUE

The issue is whether the Office properly denied appellant's request for reconsideration under 5 U.S.C. § 8128, on the grounds that it was untimely filed and failed to establish clear evidence of error.

[1] For Office decisions issued prior to November 19, 2008, a claimant had one year to file an appeal. An appeal of Office decisions issued on or after November 19, 2008 must be filed within 180 days of the decision. 20 C.F.R. § 501.3(e) (2008).

FACTUAL HISTORY

On July 11, 2000 appellant, then a 31-year-old mail carrier, filed a traumatic injury claim, alleging that she injured her neck and spine in the performance of duty when an emergency vehicle ran a red light. The Office accepted her claim for cervical strain and placed her on the periodic rolls.

On October 20, 2003 the Office referred appellant for a second opinion examination to Dr. Lester Lieberman, a Board-certified orthopedic surgeon, who submitted a November 7, 2003 report finding that she could return to full duty and that her accepted condition had resolved. Dr. Richard Memoli, appellant's treating physician, continued to support her total disability for work. The Office found a conflict in medical opinion between the two physicians and referred appellant to Dr. Kenneth E. Seslowe, a Board-certified orthopedic surgeon, for an impartial medical examination and an opinion as to whether she had continuing residuals from her accepted condition and, if so, whether she was disabled as a result of those residuals. In a February 24, 2004 report, Dr. Seslowe opined that appellant could return-to-full duty and that her accepted condition had resolved.

In a letter dated March 2, 2004, the Office proposed to terminate appellant's compensation and medical benefits based on Dr. Seslowe's referee opinion, which constituted the weight of the medical evidence. By decision dated April 19, 2004, it finalized the termination of appellant's compensation and medical benefits.

On May 3, 2004 appellant requested an oral hearing. By decision dated February 1, 2005, an Office hearing representative affirmed the April 19, 2004 decision.

On August 12, 2005 appellant filed a claim for a recurrence of disability as of July 25, 2005. In an October 19, 2005 letter, the Office informed appellant that she could not claim a recurrence because her "case ha[d] been denied."

On May 13, 2009 appellant filed a claim for a recurrence of disability, alleging that her back "started to hurt" as of April 30, 2009. In a November 5, 2009 informational letter, the Office advised appellant that because her "case ha[d] been denied," it was unable to consider her claim for recurrence and no further action would be taken on that claim.

On October 23, 2009 appellant filed a request for reconsideration "for a hearing for a case -- accident on July 9, 2009." She stated that she had medical bills and lost wages due to the initial injury and that she had sustained "a recurrence in 2005 and recently April 30, 2009."

Appellant submitted an April 29, 2009 report from Dr. Donna M. DeRosa, a chiropractor, who stated that she was treating her for "a recurring lumbar injury" and advised that she should refrain from working until her May 13, 2009 evaluation.

By decision dated November 18, 2009, the Office denied appellant's request for reconsideration on the grounds that it was untimely and did not establish clear evidence of error.

LEGAL PRECEDENT

The Federal Employees' Compensation Act provides that the Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application.[2] The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority under 8128(a). To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant must file her application for review within one year of the date of that decision.[3] The Board has found that the imposition of the one-year limitation does not constitute an abuse of the discretionary authority granted the Office under section 8128(a) of the Act.[4]

The Office, however, may not deny an application for review solely on the grounds that the application was not timely filed. When an application for review is not timely filed, it must nevertheless undertake a limited review to determine whether the application establishes clear evidence of error.[5] Office regulations and procedure provide that the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607(a), if the claimant's application for review shows clear evidence of error on the part of the Office.[6]

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.[7] The evidence must be positive, precise and explicit and must manifest on its face that the Office committed an error.[8] Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[9] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[10] This entails a limited review by the Office of how the evidence submitted with the reconsideration request bears on the evidence previously of record and whether the new evidence demonstrates clear error on the part of the Office.[11] The Board

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[2] 5 U.S.C. § 8128(a).

[3] 20 C.F.R. § 10.607(a).

[4] *Id. Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

[5] *See id*. at § 10.607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

[6] *Id.* at § 10.607(b); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3d (January 2004). Office procedure further provides, the term clear evidence of error is intended to represent a difficult standard. The claimant must present evidence which on its face shows that the Office made an error (for example, proof that a schedule award was miscalculated). Evidence such as a detailed, well-rationalized medical report which, if submitted before the denial was issued, would have created a conflict in medical opinion requiring further development, is not clear evidence of error. *Id*. at Chapter 2.1602.3c.

[7] *See Dean D. Beets*, 43 ECAB 1153, 1157-58 (1992).

[8] *See Leona N. Travis*, 43 ECAB 227, 240 (1991).

[9] *See M.L.*, 61 ECAB ___ (Docket No. 09-956, issued April 15, 2010).

[10] *See Leona N. Travis, supra* note 8.

[11] *See Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

makes an independent determination of whether a claimant has submitted clear evidence of error on the part of the Office such that the Office abused its discretion in denying merit review in the face of such evidence.[12]

ANALYSIS

The Board finds that the Office properly denied appellant's request for reconsideration on the grounds that it was untimely and did not establish clear evidence of error.

In her October 23, 2009 letter, appellant requested reconsideration "for a hearing for a case -- accident on July 9, 2009."[13] She stated that she had medical bills and lost wages due to the initial injury and that she had sustained "a recurrence in 2005 and recently April 30, 2009." The Board notes that appellant did not specifically refer to the February 1, 2005 termination decision. The content of her letter, however, indicates that she is contesting the termination of her benefits. Moreover, there is no other final decision of record in this case.[14] Therefore, the Board finds that the October 23, 2009 letter constitutes a request for reconsideration of the hearing representative's February 1, 2005 decision.

Appellant's October 23, 2009 reconsideration request occurred more than one year following the February 1, 2005 merit decision terminating her compensation and medical benefits. The Board finds that the Office properly determined that her request was untimely. Therefore, the issue is whether appellant has established clear evidence of error on the part of the Office.

Appellant alleged that she has incurred medical bills, has lost wages and has experienced two recurrences due to the accepted July 9, 2000 injury. Her allegations do not demonstrate error on the part of the Office. Therefore, they are insufficient to constitute a basis for reopening her case.

[12] *Pete F. Dorso*, 52 ECAB 424 (2001).

[13] The Board notes that appellant's reference to a July 9, 2009 accident appears to be a typographical error. The original accepted motor vehicle accident occurred on July 9, 2000. There is no evidence of record to suggest that appellant was involved in a July 9, 2009 accident.

[14] Letters from the Office dated October 19, 2005 and November 5, 2009 regarding appellant's recurrence claims do not constitute final Office decisions with concomitant rights of appeal. Rather, they were informational letters only. Therefore, the Board does not have jurisdiction over the merits of the recurrence claims. *See* 20 C.F.R. § 501.2(c) (the Board has jurisdiction to consider and decide appeals from final decisions; there shall be no appeal with respect to any interlocutory matter disposed of during the pendency of the case).

The only evidence submitted in support of appellant's reconsideration request was the April 29, 2009 report from Dr. DeRosa, who noted that she was treating appellant for a recurring lumbar injury and recommended that she refrain from working until May 13, 2009. Dr. DeRosa's report does not raise a substantial question concerning the correctness of the Office's decision. She discussed appellant's current condition and current ability to work. Dr. DeRosa did not, however, address whether appellant was disabled or had residuals at the time her benefits were terminated. Therefore, her report is not relevant to the issue which was decided by the Office and is insufficient to establish clear evidence of error.[15]

As appellant has failed to establish clear evidence of error, the Office properly declined to reopen her claim for further review of the merits.

On appeal, appellant states that she continues to need treatment for her injury-related condition. As noted, the only issue on appeal is whether the Office clearly erred in denying merit review. For reasons stated, the Board finds that the evidence does not establish clear evidence of error on the part of the Office.

CONCLUSION

The Board finds that appellant has failed to submit sufficient evidence to establish clear evidence of error and that the Office properly denied her request for merit review.

[15] *See Dean D. Beets*, 43 ECAB 1153, 1157-58 (1992).

ORDER

IT IS HEREBY ORDERED THAT the November 18, 2009 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 8, 2010
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board